

MAYER•BROWN

PARTNERSHIPS IN TRANSIT

LEGAL AND REGULATORY PERSPECTIVES

National Council on Public Private Partnerships

Dallas, Texas

October 23, 2008

David Narefsky

dnarefsky@mayerbrown.com

Mayer Brown LLP



Mayer Brown is a global legal services organization comprising legal practices that are separate entities ("Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia.

US MASS TRANSIT/RAIL PPP – AN IDEA WHOSE TIME HAS COME?

- Denver Fastracks—significant expansion of light rail throughout Denver metropolitan area;
- Chicago Airport Express Rail—building on recent successful PPPs and tied to infrastructure improvements for 2016 Olympic bid;
- LA MTA—subway and light rail expansion, with serious question re funding from sales tax;
- Amtrak—consideration of PPP mandated by Congress—with what implications?

2

MAYER•BROWN

Key Issues – Procurement Process

- Can you solicit proposals?
- Can you accept unsolicited proposals?
 - Unsolicited provide new ideas
 - Should post for competitive proposals
 - Are deadlines for competitive proposals sufficient?
 - 2– step procurement permitted?

3

MAYER·BROWN

Can the Agency contract with private entities for a broad range of project development services?

- Traditional mass transit procurement powers :
 - low bid construction
 - qualifications-based design services
 - limits on “contracting-out” operations and maintenance
- PPPs can combine development, financing, design, construction, farebox collection, operation and maintenance – some or all.

4

MAYER·BROWN

What limitations apply?

- Limited to a few “pilot” projects?
- Geographic restrictions?
- Is authority available for transit agency or limited to State DOT?
- Restrictions on “non-compete” agreements?

5

MAYER·BROWN

Farebox Revenues

- **Who has authority to establish fares?**
- **When/how can fares be changed?**
- **Must return on investment be limited?**
 - **How is ROI determined?**
- **Mass transit generally does not generate a profit—may be particularly well-suited to “availability payment” model?**

6

MAYER·BROWN

Types of Procurements Permitted

- Are PPP projects exempt from standard low-bid procurement laws?
- Procurement based on “best value”
- Call for Projects
- Competitive RFQs and RFPs
- Procurements based on financial terms such as ROI rather than price

7

MAYER·BROWN

Approval Process

- Special district and/or state approval?
- Statutory review committee?
- Prescribed evaluation criteria?
- Legislative approval of project?
- Legislative approval of terms of deal?
- Approval or veto by affected stakeholders?

8

MAYER·BROWN

Other Legal/Policy Considerations

- Property and local sales/excise tax exemption
- Condemnation/ Eminent Domain
- Requirements for public comment/review by regional planning organizations
- Ability to generate revenue from collateral sources
- Labor protection

9

MAYER BROWN

Other Legal/Policy Considerations

- Compliance with State "Sunshine" laws
- Compliance with MBE-WBE requirements
- Sovereign immunity considerations
- Protection against subsequent legislative action

10

MAYER BROWN

Other Refinements

- Stipends to unsuccessful proposers
- Authority to charge application fees
- Authority to hire consultants, lawyers
- Protect confidentiality of proposals, evaluations and negotiations prior to award

11
MAYER • BROWN

Contact

David Narefsky, Esq.
Partner
Mayer, Brown LLP
Phone: (312) 701-7303
Fax: (312) 706-9136
Email: dnarefsky@mayerbrown.com
www.mayerbrown.com

MAYER • BROWN

12
MAYER • BROWN